84

Supreme Court, U.S.
FILED
DEC 10 2007
OFFICE OF THE CLERK

No. 07-1115

In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

RUBY KIRKLAND, Executor &
RUBY P. KIRKLAND et. al,

Respondent.

On Petition for a Writ of Certiorari
To the Court of Appeals of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did serving a court document by mail one day prior to a hearing, without allowing for 3 days mailing time, violate Plaintiff/Petitioner's right to Due Process of law.

2. Did failure of The Court of Appeals of Georgia to apply the tort Discovery Rule and/or O.C.G.A. 50-21-27 (the tort discovery rule codified) to Plaintiff/Petitioner's other Psychiatric disorders brought about by child abuse violate Plaintiff/Petitioner's right to Due Process and/or Equal Protection of the law.

3. Did failure of The Court of Appeals of Georgia to apply the tort Discovery Rule and/or O.C.G.A. 50-21-27 (the tort discovery rule codified) to Plaintiff/Petitioner's Psychiatric disorder known as Post Traumatic Stress Disorder, brought about by child abuse, violate Plaintiff/Petitioner's right to Due Process and/or Equal Protection of the law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	3
A. Court Rulings Below	3
B. Facts of the Case	3
C. Question #1	8
D. Question #2	13
E. Question #3	19
F. Other Relief	30
REASONS FOR GRANTING THE PETITION	30
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	Page(s)
ALLEN v. BOARD OF TAX ASSESSORS OF PAULDING COUNTY, 37350 (247 Ga. 568, 569) (277 SE2d 660) (1981).	10
ANDERSON v. SYBRON CORPORATION, 65115 (165 Ga. App. 566, 568) (299 SE2d 160) (1983).	26, 29
BITTERMAN v. EMORY UNIVERSITY, 70208 (175 Ga. App. 348) (333 SE2d 378) (1985).	23, 25
Haines v. Kerner, 404 U. S. 519 (92 SC 594, 30 LE2d 652) (1972).	30
HICKEY v. ASKREN (198 Ga. App. 718) (403 SE2d 225) (1991).	23, 24, 25
KING v. SEITZINGERS, INC. et al. (160 Ga. app. 318)(287 SE2d 252) (1981).	14, 22, 26
LEE v. GORE, A96A0330 (221 Ga. App. 632, 633-634) (472 SE2d 164) (1996).	18
LEE STREET AUTO SALES, INC. v. WARREN, 38410 (102 Ga. App. 345, 347) (116 SE2d 243) (1960).	24
MEARS et al. v. GULFSTREAM AEROSPACE CORP. et al.,A96A2265 (225 Ga. App. 636, 638) (484 SE2d 659) (1997).	22
MOBLEY v. MURRAY COUNTY 178 Ga. 388 (173 SE 680).	16, 26
MULLANE v. CENTRAL HANOVER TR. CO. 339 U.S. 306 (1950).	8, 10, 11, 12
NATIONWIDE MUTUAL FIRE INSURANCE CO. v. LAM et al, A00A2405 (248 Ga. App. 134) (546 SE2d 283) (2001).	29

OWEN v. M & M METRO SUPPLY, INC.,
A90A2023 (198 Ga. App. 420, 421)
(401 SE2d 612) (1991). 10
SHESSEL v. STROUP et al, 40708
(253 Ga. 56, 58) (316 SE2d 155) (1984). 24, 25
SUAREZ et al. v. HALBERT et al., A00A1240,
246 Ga. App. 822, (543 SE2d 733) (2000). 13, 19, 30
SYLVESTER et al. v. DEPARTMENT OF
TRANSPORTATION, A01A2292
(252 Ga. App. 31) (555 SE2d 740) (2001). 28
THOMPSON v. LONG, A91A1008
(201 Ga. App. 480) (1) (411 SE2d 322) (1991). 30

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Constitutional and Statutory Provisions:

U.S. Const. art. VI, cl. 2
U.S. Const. Amendment V
U.S. Constitution Amendment XIV, Section 1
O.C.G.A. 50-21-27

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Other Authorities:

None

OPINIONS BELOW

Petition for a Writ of Certiorari, Case #S07C1385, was denied by the Supreme Court of Georgia September 10th, 2007 (App., infra, 1a). The Court of Appeals of Georgia handed down an 8 page written decision on #A07A0863 April 17th, 2007 (App., infra, 2a). The trial court denied Plaintiff's motion for summary judgment, granting defendant's motion for summary judgment October 23rd, 2006 (App., infra, 9a).

JURISDICTION

The state court of last resort was the Supreme Court of Georgia. Order denying a Writ of Certiorari entered September 10th, 2007. This Court's jurisdiction is invoked under 28 USCS § 1257. State courts; certiorari. Relevant part: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where...any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of...the United States.

(June 25, 1948. ch 646, § 1, 62 Stat. 929; July 29, 1970, P. L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the U.S. Constitution, the Supremacy clause, relevant part: "[T]he Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V, U.S. Constitution, relevant part:

"[N]or be deprived of life, liberty, or property, without due process of law..."

Amendment XIV, Section 1, U.S. Constitution, relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OCGA 50-21-27:

(a) It is the specific intent of the General Assembly that this article shall operate retroactively so as to apply to tort claims or causes of action which accrued on or after January 1, 1991. A tort claim or cause of action shall be deemed to have accrued on the date the loss was or should have been discovered. This article shall not apply to tort claims or causes of action which accrued prior to January 1, 1991.

(b) For tort claims and causes of action which accrued between January 1, 1991, and July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992.

(c) For tort claims and causes of action which accrue on or after July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after the date the loss was or should have been discovered.

(d) Statutes of ultimate repose and abrogation, as provided for elsewhere in this Code, shall apply to claims and actions brought pursuant to this article.

(e) All provisions relating to the tolling of limitations of actions, as provided elsewhere in this Code, shall apply to causes of action brought pursuant to this article.

STATEMENT

A. Court Rulings Below

The Supreme Court of Georgia denied Plaintiff a Writ of Certiorari: a unanimous decision.

The Court of Appeals of Georgia's 8 page opinion disallowed Plaintiff's objection to an affidavit served by mail one day prior to the summary judgment hearing; also holding the tort discovery rule and Official Code of Georgia Annotated 50-21-27 (the tort discovery rule codified) did not toll the statute of limitations on Plaintiff's psychiatric injuries resulting from child abuse by his parents. Tolling the statute for Plaintiff's psychiatric injuries was denied despite Georgia's 20 plus year precedent of tolling the statute when unknown physical injuries occur.

The trial court issued a one line ruling granting Defendant's motion for summary judgment; denying Plaintiff's motion for summary judgment. Trial court judge Hodges did not even break the seals on Plaintiff's deposition despite signing a defendant proffered order stating he reviewed all admissible items of record. The Georgia appellate court's have consistently held that not examining the evidence presented on summary judgment by not opening a deposition is not a violation they will remedy on appeal.

In short, Plaintiff was denied rights to Due Process and Equal Protection under the 14th Amendment.

B. Facts of the Case

Plaintiff was twice threatened with being shot "between the eyes" by his mother: 05/28/2004 & 05/31/2004. The outrageousness of this caused Plaintiff to suspect he might be similarly damaged by conduct during his childhood. Plaintiff was referred by state-run Advantage Behavioral Health Systems to Dr. Richard Born, an expert in this locale on Violence-based psychiatric disorders, especially Post Traumatic Stress Disorder. Post Traumatic Stress

Disorder may hereinafter be called "PTSD."

The Court of Appeals states in its ruling, April 17th, 2007, (P. 2, L. 12): "...Ruby threatened to kill him in 2004, just prior to his filing of the lawsuit"; yet does not take up this issue, two counts of Intentional Infliction of Emotional Distress, Enumeration of Error #8, Appellant's Brief, anywhere in the ruling. This action was filed 39 days after the threats. Does the court take the position the statute of limitations ran in 39 days?

Plaintiff first saw Dr. Born on 06/30/2004. He was tested and evaluated over a two day period. The initial conclusion: "his problems are directly related to his childhood environment and abnormal, and what appear to be abusive, relationships with family members." See 08/05/2004 Psychological Assessment Summary, page 2, Summary And Recommendations, the Affidavit of Dr. Richard Born (R. 296-306).

The initial belief was Plaintiff had manifested a psychiatric disorder by age ten, but no specific incidents had been found.

It was also initially believed Plaintiff had suffered a physical debilitation at age 14 due to unknown causes.

On 07/09/2004, Plaintiff proceeding Pro se filed a complaint based on his believed damages (R. 5-6). Plaintiff was further evaluated by Dr. Born that same day. By 07/19/04, when the original complaint was amended, the belief was Plaintiff's disorder had begun at age 5 (Affidavit of Dwain Lee Kirkland, R. 289-295, Item #7). (Note there are two different Affidavits of Dwain Lee Kirkland filed on the same date).

About 10/12/2004, in a pre-trial order hearing, counsel for defendants, Thomas H. Rogers, Jr., regarding the complaint and damages, stated: "We're not contesting the damages; we're just saying the statute of limitations has run out."

The same or equivalent was again said by Mr.

Rogers on 03/23/2005. These concessions by counsel are in the affidavit of Dwain Lee Kirkland (R. 280-288, Item #'s 6 and 7). This allegation of a concession made by Defendants' agent, an attorney in fact and at law, was never rebutted in any way by Mr. Rogers or the Defendants. Such statements made by Appellees' counsel constitute an admission by a party-opponent.

On 11/18/2004, Dr. Born did followed up his 08/05/2004 report. In this Psychological Assessment Summary, on page 2, Summary And Recommendations, Dr. Born stated: *Based upon the DSM-IV criteria for the diagnosis of Posttraumatic Stress Disorder, it is my opinion that Mr. Kirkland does exhibit this disorder. The childhood events that he reports (and appear corroborated by the documentation I have reviewed) appear to have been events that involved issues of death and threats to one's physical integrity to which he responded with feelings of intense fear, helplessness and horror. ...My diagnostic impression of Mr. Kirkland's condition is that he does exhibit Posttraumatic Stress Disorder, chronic, with delayed onset.* See report, Affidavit of Dr. Richard Born (R. 296-306). The "documentation I have reviewed" was a transcript of the 06/17/2004 Probate hearing in Madison County on my late father's will. The corroborative testimony was elicited from my sister Sheila K. Meadow concerning "similar acts" of fraud directed at my father. In that testimony she corroborated 3 of the incidents elicited by counsel, Deposition 03/30/2006 (R. 200-265: P. 29, 19; P. 30,11; and P. 31,12). These same incidents are covered by Affidavit of Dwain Lee Kirkland (R. 289-295, Item #13). (Please note two different Affidavits of Dwain Lee Kirkland filed on the same date).

On 04/15/2005, Dr. Born issued a Psychological Assessment Update. P. 1, paragraph 2: "Mr. Kirkland has not been able to engage in gainful employment since 1993 due to his physical health and emotional health concerns.

Aside from whatever true physiological problems he may have developed around this time, I also think that it is most likely that his emotional problems, including PTSD stemming from childhood, and the personality problems associated with it, were prominent factors in producing his work disability in 1993." See this report, Affidavit of Dr. Richard Born (R. 296-306). This aspect of damages is also covered by Affidavit of Dwain Lee Kirkland (R. 289-295, Item #6, "Unemployment from the ages of 38 to 49)".

03/30/2006, Plaintiff Dwain Lee Kirkland was deposed, said deposition is part of the record. Plaintiff did not propound discovery to the Defendants.

06/12/2006, Defendants moved for Summary Judgment on all counts of the complaint without filing Affidavits or evidence of any kind (R. 174-176).

07/10/2006, within the 30 days allowed, Plaintiff/Appellant answered Defendants' motion (R. 268-270), statement of theory and genuine issues (R. 271-273); countered with a motion for summary judgment (R. 274-276) grounded on his 03/30/06 deposition; verification of the complaint via Affidavit (R. 280-288, Item #'s 1 to 5); Concessions of opposing Counsel via Affidavit (R. 280-288, Item #'s 6 & 7); 18 count Affidavit supporting the allegations of the Complaint (289-295); the Affidavit (R. 296-306) and Interrogatories (R. 307-320) of Dr. Richard Born. (Please note that the questions are on an apparently blank and unsigned form, the notarized answers are at R. 317-319 in the record.)

On 10/17/2006, 127 days after Defendant's summary judgment filing, 99 days after Plaintiff's summary judgment filing, and one day before the hearing, Defendant Ruby P. Kirkland filed an Affidavit (434-436) at 4:09 P.M. Plaintiff was not served the Affidavit till 10 minutes before the hearing the following day, 10/18/2006: an obvious violation of 9-11-56 (c): "The adverse party prior to the day of hearing may serve opposing affidavits."

Plaintiff/Appellant objected to the late-filed affidavit (MT P. 14,7 - 10/18/06). His objection was taken "under advisement" then not ruled on in the written order that states: "...the Court having reviewed...all admissible matters of record...." (R. 438).

Plaintiff/Appellant went on to take up Intentional Infliction of Emotional Distress and his mother's threats to kill him: "shoot you between the eyes" (MT P. 19,18 to 23,10 - 10/18/06); also arguing "I think I've established that for someone's mother to threaten to shoot him between the eyes when she owns a pistol is extreme and outrageous when she may have been carrying it that day."

Plaintiff/Appellant also took up the tolling of the Statute of Limitations by the Discovery Rule (MT P. 22, L. 3 - 10/18/06); the exercise of Reasonable Diligence (MT P. 22, L. 19 - 10/18/06); and, under Anderson v. Sybron, that he was aware he had received a "red rash on his hands and feet from the defendant's Agent Orange" but was not aware he had received "the lung cancer" (MT P. 22, L. 20 to P. 23, L. 10 - 10/18/06).

Five days later on 10/23/2006, Defendant/Appellee's motion for summary judgment was granted on all counts of Plaintiff/Appellant's complaint; Plaintiff's motion was of course denied (R. 438).

Plaintiff later examined his 03/30/2006 deposition at the Clerk of Court's office. The seals were intact, unbroken; despite the judge's order stating: "...the Court having reviewed...all admissible matters of record...." (Order R. 438, Order to unseal Deposition R. 471).

The case was appealed. Appellant's Court of Appeals brief contained 10 enumerations of error. The April 17th, 2007 decision found all Appellant's positions invalid as a matter of law. Had the Court of Appeals found any other way, Plaintiff would have won a $4,000,000 judgment based on counsel's own admissions and failures to timely file evidence and know about Georgia's discovery rule.

Appellant filed a motion for reconsideration, 6 enumerations of error; denied.

Appellant petitioned Georgia's supreme court, a writ of Certiorari, the same 6 enumerations of error, denied September 10th, 2007.

C. Question #1

Did serving a court document by mail one day prior to a hearing, without allowing for 3 days mailing time, violate Plaintiff/Petitioner's right to Due Process of law.

Raised in the courts below as follows:

Plaintiff's Petition for Certiorari, SCOG, page 2, introductory statement: **"Enumeration #1 is a violation of Due Process and is contrary to the holding of the Supreme Court of the United States in MULLANE v. CENTRAL HANOVER TR. CO., 339 U.S. 306 (1950)...these rulings of The Court of Appeals have violated Appellant/Petitioner's rights under 42 USC 1983."**

Plaintiff's Petition for Certiorari, SCOG, Enumeration of Error #1: **"This type of service, in which the respondent cannot 'reasonably' receive and have an opportunity to respond to a filing, is a plain violation of Due Process under the 5th and 14th Amendments to the U.S. Constitution per MULLANE v. CENTRAL HANOVER TR. CO., 339 U.S. 306 (1950) quoted extensively below."**

Page 11, Enumeration of Error #1, Plaintiff's Certiorari, SCOG: **"'But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' MULLANE v. CENTRAL HANOVER TR. CO. (339 U.S. 306, 314-315) (1950)."**

Page 13, paragraph 2, Enumeration of Error #1, Plaintiff's Certiorari SCOG: "This decision by the Court of Appeals violates Plaintiff/Appellant's right to Due Process

and Equal Protection under the 5th and 14th Amendments to the U.S. Constitution."

Plaintiff's Motion for Reconsideration, Court of Appeals of Georgia, page 8, Enumeration of Error #1: "The Court's current opinion violates Plaintiff/Appellant's right to Due Process and Equal Protection under the 5th and 14th Amendments to the U.S. Constitution."

Page 13, paragraph 3, Enumeration of Error #1, Plaintiff 's Reconsideration, Court of Appeals: "This decision by the Court of Appeals violates Plaintiff/Appellant's right to Due Process and Equal Protection under the 5th and 14th Amendments to the U.S. Constitution."

As Enumeration of Error #4 in Appellant's Brief and Reply Brief, addressed in Section 2 of the Court of Appeals opinion:

4. Denial of Plaintiff/Appellant's objection to the untimely filing of the affidavit of Ruby Kirkland was error, if in fact it was denied.

Raised 10/18/06 trial court hearing on the cross motions for summary judgment at page 14, line 7, wherein Plaintiff objected to the late filing and service of the affidavit of Ruby P. Kirkland.

Enumeration of Error #4 in Appellant's Brief and Reply Brief, addressed Section 2 of the Court of Appeals opinion. As stated above, the Court's current opinion violates Plaintiff/Petitioner's right to Due Process and Equal Protection under the 14th Amendment.

Plaintiff objected to late filing and service, the affidavit of Ruby Kirkland (MT P. 14,7 - 10/18/06). Objection was taken "under advisement" (MT P. 14,22 - 10/18/06) though not ruled upon in the trial court's order stating: "...the Court having reviewed...all admissible matters of record...." (R. 438).

As stated above: "On October 17th, 2006, 127 days after Defendant/Appellee's motion for summary judgment was filed, and 99 days after Plaintiff/Appellant's motion for summary judgment was filed, and one day before the hearing, Defendant Ruby P. Kirkland filed an Affidavit (R. 434-436) in the Superior Court at 4:09 P.M. The Plaintiff/Appellant was not served with said Affidavit until 10 minutes before the hearing on the following day, October 18th, 2006. This is an obvious violation of 9-11-56 (c): 'The adverse party prior to the day of hearing may serve opposing affidavits.'"

The key wording in O.C.G.A. 9-11-56(c) is "prior to the day of hearing may serve"; with "may serve" being the hinge on which this caption turns. The obvious intent of this code section is to allow the moving party at least one day's notice of an adverse affidavit. The day of filing has nothing to do with this caption. Only the service is important. Since Defendants' "10 minutes before the hearing" service violates the plain language of O.C.G.A. 9-11-56(c), Ruby Kirkland's affidavit, the only evidence of any kind offered by Defendants', is inadmissible.

Court of Appeals in Section 2, the opinion: "1. Proof of service of pleadings and other papers subsequent to the filing of the original complaint may be by certificate of counsel. OCGA 9-11-5 (b); Allen v. Bd. of Tax Assessors of Paulding County, 247 Ga. 568 (277 SE2d 660) (1981)." OWEN v. M & M METRO SUPPLY, INC., A90A2023 (198 Ga. App. 420, 421) (401 SE2d 612) (1991)." Owen however cites Allen v. Bd. of Tax Assessors of Paulding County: "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 314 (70 SC 652, 94 LE 865) (1949)." ALLEN v. BOARD OF TAX ASSESSORS

OF PAULDING COUNTY, 37350 (247 Ga. 568, 569) (277 SE2d 660) (1981).

Under both Allen and Mullane, a ruling by SCOTUS: **"due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties."** More from Mullane: **"...reasonably calculated...as reasonably to convey...must afford a reasonable time...these conditions** [339 U.S. 306, 315] **are reasonably met... just and reasonable character of the requirements...[b]ut when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.** The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected...." **MULLANE v. CENTRAL HANOVER TR. CO. (339 U.S. 306, 314-315) (1950).**

The **"just and reasonable character of the requirements"** of service are not met by mailing a document at 5:00 P.M. or midnight the day prior to a hearing, then delivering a second copy to the opposing litigant 10 minutes before said hearing. Neither is the **"must afford a reasonable time"** requirement. This is clearly spelled out in rules 5 & 6 of the Federal Rules of Civil Procedure:

> **F.R.C.P. Rule 5. Service and Filing of Pleadings and Other Papers:**
> **(b) Making Service.**
> **(2) Service under Rule 5(a) is made by:**
> **(A) Delivering a copy to the person served by: (i) handing it to the person;"**
> **(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.**

F.R.C.P. Rule 6. Time
(e) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the period would otherwise expire under subdivision (a).

The Due Process requirements of service in O.C.G.A. 9-11-56 (c) could have been met under F.R.C.P. Rule 5 (b)(2)(A)(i) by "handing it to the person" the day prior to the hearing. If however the pleading was mailed under F.R.C.P. Rule 5 (b)(2)(B), as it was in this case, "3 days are added" under F.R.C.P. 6 (e) to allow a response. This requirement is only plain and simple common sense. The calculations for time in Georgia are based on Rule 5 & 6 and allow the same 3 days for mailing:

Title 9, Chapter 11, Section 6 (9-11-6)
(e) Additional time after service by mail. ...three days shall be added to the prescribed period.

Obviously, to meet Due Process requirements under Mullane above, as well as the requirements of service under O.C.G.A. 9-11-56 (c), an affidavit must be mailed no later than 4 days prior to the date of the hearing. In the case at bar, the defendants ridiculously had 99 days from the date of service of Plaintiff's Motion for Summary Judgment to respond via affidavit.

Cite "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." MULLANE v. CENTRAL HANOVER TR. CO. (339 U.S. 306, 315) (1950).

This decision by the Court of Appeals violates Plaintiff/Appellant's right to Due Process and Equal Protection under the 5th and 14th Amendments.

Georgia Standard of Review: "'[P]lain legal error...'" SUAREZ et al. v. HALBERT et al., A00A1240, 246 Ga. App. 822, (543 SE2d 733) (2000).

D. Question #2

Did failure of The Court of Appeals of Georgia to apply the tort Discovery Rule and/or O.C.G.A. 50-21-27 (the tort discovery rule codified) to Plaintiff/Petitioner's other Psychiatric disorders brought about by child abuse violate Plaintiff/Petitioner's right to Due Process and/or Equal Protection of the law.

Raised in the courts below as follows:

Plaintiff's Petition for Certiorari, SCOG, page 2, the introductory statement: **"...Enumeration #'s 2 and 3 are a violation of substantive due process, The Court of Appeals having applied a factually nonequivalent precedent to it...these rulings of The Court of Appeals have violated Appellant/Petitioner's rights under 42 USC 1983...."**

Plaintiff's Certiorari, SCOG, Enumeration of Error #2:

> ***2. Denial of Plaintiff/Appellant's summary judgment on his claims constituting other Psychiatric disorders brought about by child abuse was error.***

Certiorari, SCOG, page 16, paragraph 1, Enumeration of Error #2: **"Failure to apply the 'discovery rule' and the 'theory of continuing tort' to these claims deprives this Plaintiff/Appellant of his right to Due Process and Equal Protection under the 14th amendments to the U.S. Constitution."**

Plaintiff's Motion for Reconsideration, Court of Appeals, page 13, Enumeration of Error #2:

2. Denial of Plaintiff/Appellant's summary judgment on his claims constituting other Psychiatric disorders brought about by child abuse was error.

Motion for Reconsideration, COAG, page 16, paragraph 1, Enumeration of Error #2: "Failure to apply the 'discovery rule' and the 'theory of continuing tort' to these claims deprives this Plaintiff/Appellant of his right to Due Process and Equal Protection under the 5th and 14th amendments to the U.S. Constitution."

Enumeration of Error #7, Appellant's Brief and Reply Brief, addressed in Section 3 of the Court of Appeals opinion:

7. Denial of Plaintiff/Appellant's summary judgment on his claims constituting other Psychiatric disorders was error.

Plaintiff filed a motion for summary judgment in the trial court within 30 days of Defendants' motion for summary judgment, specifically delineating that said motion was a portion of the answer to Defendants' motion. Plaintiff's brief (page 2) supporting that motion reads:

As to Plaintiff's claim in the Summary Judgment that the Statute of Limitations on the action was tolled till about July 2004, Plaintiff points to King v. Seitzingers, Inc. below in which the "Doctrine of Continuing Tort" later to be known as the "Discovery Rule" is enunciated.

KING v. SEITZINGERS, INC. et al.
160 Ga. app. 318
(287 SE2d 252)

Excerpts: 'As indicated above, it is already the law in Georgia that a tort cause of action does not accrue unless the plaintiff knows or with reasonable diligence should have known that he suffered an injury. We note that in the cases in which this law has been applied, the cause of the injury was apparent at the time the nature of the injury was discovered. It is only a logical extension of the existing Georgia law to adopt the rule which many other courts have.

'Accordingly, we find that the appellant's cause of action did not accrue and the statute of limitation did not run against him until he knew or through the exercise of reasonable diligence should have discovered not only the nature of his injury but also the casual connection between the injury and the alleged negligent conduct of appellee.

'Construing the evidence most strongly against the movant-appellee and giving appellant the benefit of all reasonable doubt, there remains the question of whether appellant knew or through reasonable diligence should have discovered that his injury resulted from appellee's action before or after the two years preceding the filing of the suit. Since this is a disputed issue of material fact which must be decided by a jury, the trial court erred in deciding it adversely to appellant.'

The bottom line is that the above-styled case has issues of "the nature of his injury" and "the casual connection between the injury and the alleged negligent conduct of" the defendants which were, at the time of the Complaint, still being investigated by the Plaintiff and a licensed psychologist. The actual

"nature of his injury" and the "casual connection between the injury and the alleged negligent conduct" of the Defendants was not actually arrived at till about November 2004, some four months after the complaint was filed. There was no time prior to this "when the plaintiff could first have maintained his action to a successful result" as per "the rule in Mobley v. Murray County, 178 Ga. 388 (173 SE 680)." Any other application of the law would be abhorrent to the 5th and 14th Amendments of the U.S. Constitution concerning Due Process and Equal Protection as Plaintiff could have, at no time prior to this, instituted and maintained a suit. Such denial of the "Discovery Rule" would dictate that there was never a time in which Plaintiff could have received compensation for his injuries. Since others are not debarred from receiving compensation under the law for their injuries, a violation of the "Discovery Rule" is a violation of the Equal Protection clause of the 14th Amendment as above.

"Other" psychiatric disorders addressed in this question are Personality Disorder NOS 301.89 & Depressive Disorder NOS 311; Plaintiff/Petitioner's Post Traumatic Stress Disorder 309.81 taken up in a different section of The Court of Appeals opinion will be addressed in Question #3 below. Monetary damages for "other" psychiatric disorders in Plaintiff's deposition (R. 200-265, P. 58,12) were not calculated for in the complaint. See Plaintiff's Affidavit (R. 289-295). Only monetary damages for the four incidents causing the bulk of Plaintiff's harm (the Post Traumatic Stress Disorder) were calculated. Plaintiff did not amend the complaint to include monetary amounts for these "other" psychiatric injuries because Defendants' counsel about 10/12/2004 conceded to the exact monetary damages calculated in the original complaint

(MT P. 24,1; 10/18/06) regarding the Post Traumatic Stress Disorder (PTSD). These "other" psychiatric injuries were also not known till late 2004 or later allowing the "discovery rule" and the "theory of continuing tort" to applied to them in the same manner as The Court's ruling on PTSD in Section 4. These claims constitute negligence and are recognizable under the law.

Enumeration of Error #7, Appellant's Brief and Reply Brief, addressed in Section 3, the Court of Appeals opinion. The Court, early in its opinion (P. 2, L. 10), states that the actions of the defendants against Dwain Lee Kirkland, then a minor child, "amounted to intentional and negligent infliction of emotional distress, assault, battery...." None of those torts: intentional infliction of emotional distress, negligent infliction of emotional distress, assault or battery will lie against a parent for corporal punishment or threats of corporal punishment directed against their own child. The Court in its opinion, apparently based on these earlier assertions, also states (P. 6, L. 10): "As the alleged abuses themselves were wrongful, Dwain's right of action accrued at the time of the abuse...." This is simply asinine. The fact Dwain was a minor child, 5 to 12 years old, at the time of the abuse *is* the very fact that makes this a case of first standing in Georgia. Though these same "abuses" would be "wrongful" if committed against an adult, they were committed against a minor child and were neither criminally nor civilly wrongful at the time of their commission due to the fact that corporal (bodily) punishment or continual threats of corporal punishment directed against ones own child are perfectly legal. The underlying tort in this case is negligence due to the excessive manner in which such corporal punishment was carried out. The actual damages themselves, the diagnosable mental injuries, were the result of negligence; though at first glance they appear to fall into the adult torts of "intentional and negligent

infliction of emotional distress, assault and battery."

Cite: "Under the Georgia Civil Practice Act, pleadings need only 'give notice of what the adverse party may expect to meet, rather than to frame issues. . . . It now suffices to plead conclusions, whether of fact or of law, provided the pleading is sufficiently definite so as to give fair notice to the opposite party of the precise nature of the matters thereby raised and sufficiently inform the court to determine the question presented.' (Citations omitted.) Woods v. Canady, 126 Ga. App. 389 (1) (190 SE2d 920) (1972). Pleadings will be liberally construed in light of this purpose and will be 'construed to serve the best interests of the pleader. [Cit.]' Rodgers v. Ga. Tech Athletic Assn., 166 Ga. App. 156, 161 (2) (b) (303 SE2d 467) (1983). 'When examining a complaint, courts are compelled to determine whether the facts alleged state a claim for relief under which the plaintiff may recover. It is not necessary that the complaint be perfect in form or set out all of the issues with particularity, it is necessary only to place the defendant on notice of the claim against him. [Cits.]' Walton v. James & Dean, Inc., 177 Ga. App. 77, 78 (1) (338 SE2d 516) (1985)." **LEE v. GORE, A96A0330 (221 Ga. App. 632, 633-634) (472 SE2d 164) (1996).**

The preceding is particularly true in a case of first standing in Georgia where the "discovery rule" and the "doctrine of continuing tort" are being applied to diagnosable mental illnesses brought about by negligent corporal punishment administered to a child. Jorisch v. Rhythm Festival, Inc. & Haines v. Kerner, 404 U. S. 519 (92 SC 594, 30 LE2d 652) (1972), regarding the leniency of Pro se pleadings apply as well.

Plaintiff/Petitioner also wishes to submit the argument of Enumeration of Error #3 below regarding this error. Failure to apply the "discovery rule" and the "theory of continuing tort" to these claims deprived this Plaintiff of his right to Due Process and Equal Protection under the

14th Amendment. Others have recovered for similar injuries while this Plaintiff could never at any time prior to 2004 have brought this action because the "abuses" on his person as a minor child were not against any law; and he did not know, nor should he have known, he was injured by the abuses/negligent acts of Defendants at any time prior to 2004. There would be no cognizable claim here at all except for the fact Plaintiff received a diagnosable psychiatric disorder, a mental illness, due to actions of the Defendants. No matter how upset Plaintiff is, or might continue to be, about the way he was treated as a child; it is only the diagnosable mental illness for which he can seek damages. This is due to the fact that a diagnosable mental illness is a separate and distinct injury from mere damaged feelings due to "infliction of emotional distress." A diagnosable mental illness is comparable in magnitude to a broken back or neck, or paraplegia; it is an injury of a magnitude that it, just like the physical injuries mentioned, may never be gotten over.

Georgia Standard of Review: "'[P]lain legal error...'" SUAREZ et al. v. HALBERT et al., A00A1240, 246 Ga. App. 822, (543 SE2d 733) (2000).

E. Question #3

Did failure of The Court of Appeals of Georgia to apply the tort Discovery Rule and/or O.C.G.A. 50-21-27 (the tort discovery rule codified) to Plaintiff/Petitioner's Psychiatric disorder known as Post Traumatic Stress Disorder, brought about by child abuse, violate Plaintiff/Petitioner's right to Due Process and/or Equal Protection of the law.

Raised in the courts below as follows:

Plaintiff's Petition for Certiorari, SCOG, page 2, the introductory statement: "Enumeration #'s...3 are a violation of substantive due process, The Court of Appeals having applied a factually nonequivalent precedent to

it...these rulings of The Court of Appeals have violated Appellant/Petitioner's rights under 42 USC 1983...."

Certiorari, SCOG, page 16, Enumeration of Error #3:

3. Denial of Plaintiff/Appellant's summary judgment on his claims constituting Post Traumatic Stress Disorder brought about by child abuse was error.

Certiorari, SCOG, page 21, paragraph 4, Enumeration of Error #3: **"Plaintiff further asserts that to apply King to physical injuries, but not to mental injuries, creates a favored class, thus depriving those with mental injuries of Equal Protection under the 14th Amendment to the U.S. Constitution."**

Certiorari, SCOG, page 22, paragraph 1, Enumeration of Error #3: **"'Reasonable diligence' and the 'discovery rule' as enunciated in Mobley v. Murray County, King and Anderson supra are the controlling issues of this case. Any other application of the law to this case is abhorrent to the 5th & 14th Amendments to the U.S. Constitution concerning Due Process and Equal Protection as Plaintiff could have, at no time prior to this, instituted and maintained a suit."**

Certiorari, SCOG, page 24, paragraph 2, Enumeration of Error #3: **"Plaintiff/Appellant's claims against Defendant/Appellees for inflicting the injuries upon his person known as Post Traumatic Stress Disorder are valid under the plain language of Georgia Law, O.C.G.A. 50-21-27; as well as the precedent set in Mobley, King and Anderson supra. The use of any other theory of law, as stated above, deprives this Plaintiff/Appellant of the Due Process and Equal Protection clauses of the U.S. Constitution."**

Plaintiff's Motion for Reconsideration, Court of Appeals, page 16, Enumeration of Error #3:

3. Denial of Plaintiff/Appellant's summary judgment on his claims constituting Post Traumatic Stress Disorder brought about by child abuse was error.

Motion for Reconsideration, COAG, page 21, paragraph 2, Enumeration of Error #3: "'Reasonable diligence' and the 'discovery rule' as enunciated in Mobley v. Murray County, King and Anderson supra are the controlling issues of this case. Any other application of the law to this case is abhorrent to the 5th and 14th Amendments of the U.S. Constitution concerning Due Process and Equal Protection as Plaintiff could have, at no time prior to this, instituted and maintained a suit. ...Since others are not barred from receiving compensation under the law for their injuries, a violation of the "discovery rule" is a violation of the Equal Protection clause of the 14th Amendment as above."

Reconsideration, COAG, page 21, paragraph 2, Enumeration of Error #3: "Plaintiff/Appellant's claims against Defendant/Appellees for inflicting the injuries upon his person known as Post Traumatic Stress Disorder are valid under the plain language of Georgia Law, O.C.G.A. 50-21-27; as well as the precedent set in Mobley, King and Anderson supra. The use of any other theory of law, as stated above, deprives this Plaintiff/Appellant of the Due Process and Equal Protection clauses of the U.S. Constitution."

Originally Enumeration of Error #6 in Appellant's Brief and Reply Brief, addressed in Section 4 of the Court of Appeals opinion:

6. Denial of Plaintiff/Appellant's summary judgment on his claims constituting Post Traumatic Stress Disorder was error.

Plaintiff filed a motion for summary judgment in the

trial court within 30 days of Defendants' motion for summary judgment, specifically delineating that said motion was a portion of the answer to Defendants' motion. The tolling of the statute of limitations in this question and Question #2 above are identical and consequently Plaintiff/Petitioner was only required to raise it in his brief one time. Accordingly, Plaintiff/Petitioner would like to resubmit the entire argument of Question #2 above, as contained in his brief supporting his motion for summary judgment, at page 2, paragraph 2, regarding KING v. SEITZINGERS, INC. et al. 160 Ga. app. 318 (287 SE2d 252) and the tolling of the statute of limitations.

Enumeration of Error #6 is addressed in Section 4 of the Court of Appeals opinion. That court would apparently like to graft the principle cited in Mears et al. v. Gulfstream to this case.

Cite: "The test to be applied in determining when the statute of limitations begins to run against an action sounding in tort is in whether the act causing the damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes a legal injury and gives rise to a cause of action. If the act is of itself not unlawful in this sense, and a recovery is sought only on account of damage subsequently accruing from and consequent upon the act, the cause of action accrues and the statute begins to run only when the damage is sustained..." MEARS et al. v. GULFSTREAM AEROSPACE CORPORATION et al., A96A2265 (225 Ga. App. 636, 638) (484 SE2d 659) (1997).

In the instant case, as well-stated in Question #2 above, none of the acts causing the damage were in and of themselves "an invasion of some right of the plaintiff" and did not constitute "a legal injury" and did not give rise to a "cause of action" that would cause the statute of limitations to run. When the acts are "not unlawful in this sense, and a recovery is sought only on account of damage subsequently accruing from and consequent upon the

act[s], the cause of action accrues and the statute begins to run only when the damage is sustained...." and concurrently or subsequently discovered per the "discovery rule" in King, Anderson and OCGA 50-21-27 below.

The Court of Appeals in its ruling on this error cited **HICKEY v. ASKREN (198 Ga. App. 718) (403 SE2d 225) (1991)** and **BITTERMAN v. EMORY UNIVERSITY, 70208 (175 Ga. App. 348) (333 SE2d 378) (1985).** Both are distinguishable. Neither is even remotely factually equivalent to the case at bar. The Court in its opinion states (P. 6, L. 10): "As the alleged abuses were themselves wrongful." The "alleged abuses" in this case would have been both criminally and civilly "wrongful" if they had been administered to an adult. However, as stated above, a child has no such rights. A child can be struck with both the front and back of the hand and beaten with a belt. The four instances causing the P.T.S.D. consisted of being struck with both the front and back of the hand and being beaten with a belt. Since none of these actions against a child is either criminally or civilly wrongful, the statute of limitations did not begin to run. The statute only began to run when "the child" while exercising "reasonable diligence" realized he had possibly sustained a diagnosable psychiatric injury due to the four acts of the defendants.

The Court of Appeals of Georgia quotes Hickey in its opinion (P. 7, L. 6): "...the tortious acts producing the injur[ies]" and then states "ceased more than two years before he [this appellant] filed the complaint." In Kirkland v. Kirkland, the instant case, none of the four acts that caused the P.T.S.D. were in fact "tortious acts" at the time of their commission. The Plaintiff at the time of commission of these acts was 5 to 12 years old and liable to be struck or beaten at any time with no recourse, criminal or civil, under the law. Corporal or bodily punishment on a child was not and is not criminal or tortious in Georgia, then or now. It's the fact the corporal punishment was

done in a negligent manner that caused a diagnosable psychiatric disorder that makes said corporal punishment a tort. If there was no diagnosable P.T.S.D., there would be no tort. The tort is negligence.

Cite: "The petition embraces all of the elements necessary to the maintenance of a cause of action based upon negligence. These elements, four in number, are: (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty. Cf. Prosser on Torts, 2d Ed. 35." **LEE STREET AUTO SALES, INC. v. WARREN, 38410 (102 Ga. App. 345, 347) (116 SE2d 243) (1960).**

All the elements of negligence are contained in this case: **"A legal duty to conform to a standard...a breach...causal connection...loss or damage."**

The same type of argument was already made, pages 14-15, Appellant's Reply Brief: "First of all, none of the four incidents was an illegal act causing the statute to run immediately upon commission of the act. Secondly, O.C.G.A. 50-21-27 of The Georgia Tort Claims Act was passed in 1992 after Hickey and gives the Discovery Rule to all 'tort claims and causes of action.' Third, Hickey actually works for Appellant: 'We note that this is not an instance in which all injury resulting from the alleged malpractice did not manifest itself until more than two years after the negligent act so as to render application of that statute constitutionally invalid under the ruling in Shessel v. Stroup, 253 Ga. 56 (316 SE2d 155) (1984).' HICKEY v. ASKREN (198 Ga. App. 718, 720) (403 SE2d 225) (1991)."

Kirkland v. Kirkland *is* "an instance in which all injury resulting from the alleged" abuse "did not manifest

itself until more than two years after the negligent act." Hickey and the instant case are exact opposites. It is Georgia Supreme Court's holding in Shessel v. Stroup, cited in Hickey, that is controlling: "The general tort limitation begins only when the action 'accrues' and that is no sooner than the date of injury and perhaps no sooner than the date of discovery." **SHESSEL v. STROUP et al, 40708 (253 Ga. 56, 58) (316 SE2d 155) (1984).**

The **"date of the discovery,"** of the Plaintiff's PTSD in the instant case was November 2004, four months after the lawsuit had been filed. Plaintiff while exercising "reasonable diligence" realized he **might** have a psychiatric injury, due the death threats of his mother and filed suit.

Cite: "...[T]he record does not raise any questions of fact whether appellant **knew** about...the impact to some degree of that negligent treatment on her mental health." **HICKEY v. ASKREN (198 Ga. App. 718, 720) (403 SE2d 225) (1991).**

Hickey itself raises the **"knew"** or "should have discovered" doctrine from King, Anderson and O.C.G.A. 50-21-27. It was the fact Hickey "knew" or "should have known" about her injuries that caused the statute of limitations to run against her.

Regarding The Court of Appeals citation of Bitterman v. Emory University: "The 'discovery rule' he attempts to use was adopted in Georgia to aid a plaintiff suffering a continuing tort, the cause of which he had recently discovered. See McAuley v. Wills, 251 Ga. 3 (1) (303 SE2d 258) (1983); King v. Seitzingers, Inc., supra. It is not a means by which a plaintiff may extend a statute of limitation by **forestalling medical attention."** **BITTERMAN v. EMORY UNIVERSITY, 70208 (175 Ga. App. 348, 348) (333 SE2d 378) (1985).**

For Judge Benham to make that statement indicates Bitterman had not timely sought **"medical attention."**

Cite: "Accordingly, we find that the appellant's cause

of action did not accrue and the statute of limitation did not run against him until he knew or through the exercise of reasonable diligence should have discovered not only the nature of his injury but also the casual connection between the injury and the alleged negligent conduct of appellee." KING v. SEITZINGERS, INC. et al., 62653 (160 Ga. app. 318, 320) (287 SE2d 252) (1981).

Bitterman does not negate the discovery rule in King. Bitterman is aligned with it. Plaintiff Bitterman did not get "medical attention" at the time of his possible injury; thus did not exercise "reasonable diligence"; thus did not discover "the casual connection between the injury and the alleged negligent conduct of appellee" within the two years prior to the filing of the lawsuit.

Further, shouldn't persons who have suffered mental injury be on par with those who have suffered physical injury. The psychiatric damage, the diagnosable mental injury, is the loss in the instant case. King has often been applied to surgical errors, the injury being found at a later date. To apply King to physical injuries, but not to mental injuries such as PTSD (309.81), creates a favored class depriving those with mental injuries of Equal Protection under the 14th Amendment to the U.S. Constitution.

Cite: "The fact that 'an' injury occurs and the causal connection is discovered does not cause the statute of limitations to run against different injuries yet unsustained, or with reasonable diligence yet undiscovered, and not yet causally connected. King, supra, pp. 318-319. This is consistent with the rule in Mobley v. Murray County, 178 Ga. 388 (173 SE 680), that the cause of action accrues 'when the plaintiff could first have maintained his action to a successful result.'" ANDERSON v. SYBRON CORPORATION, 65115 (165 Ga. App. 566, 568) (299 SE2d 160) (1983).

"Reasonable diligence" and the "discovery rule" enunciated in Mobley v. Murray County, King and

Anderson supra are the controlling issues of this case. Any other application of the law to this case is abhorrent to the 5th & 14th Amendments concerning Due Process and Equal Protection because Plaintiff could not have, at any time prior to this, instituted and maintained a suit. Denial of the "discovery rule" dictates that there was never a time at which Plaintiff could have received damages for his injuries. Since others are not barred from receiving damages under the law for their injuries, a violation of the "discovery rule" is a violation of the Equal Protection clause of the 14th Amendment. The legislature being aware of these facts, on July 1st, 1992, incorporated them into law:

Title 50, Chapter 21, Section 27 (50-21-27)

(a) It is the specific intent of the General Assembly that this article shall operate retroactively so as to apply to tort claims or causes of action which accrued on or after January 1, 1991. **A tort claim or cause of action shall be deemed to have accrued on the date the loss was or should have been discovered.** This article shall not apply to tort claims or causes of action which accrued prior to January 1, 1991.

(b) (omitted)

(c) **For tort claims and causes of action which accrue on or after July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after the date the loss was or should have been discovered.**

(d) (omitted)

(e) (omitted, see full text, OCGA 50-21-27, at page 2 of this petition.)

(a): "A tort claim or cause of action shall be deemed to have accrued on the date the loss was or should have been discovered."; (c): "For tort claims and causes of action which accrue on or after July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after the date the loss was or should have been discovered."

Cite: "The Georgia Tort Claims Act has its own statute of limitation, which should be read in conjunction with the regular statute of limitation; '[f]or tort claims and causes of action which accrue on or after July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after the date the loss was or should have been discovered.' OCGA 50-21-27 (c); see Doe 102 v. Dept. of Corrections, 268 Ga. 582, 583 (2) (492 SE2d 516) (1997)." SYLVESTER et al. v. DEPARTMENT OF TRANSPORTATION (252 Ga. App. 31) (555 SE2d 740) (2001).

The Georgia Tort Claims Act has its own statute of limitation, "which should be read in conjunction with the regular statute of limitation." O.C.G.A. 50-21-27 actually gives the protection of the discovery rule in Mobley, King and Anderson to all "tort claims and causes of action." Plaintiff's "loss was or should have been discovered" on 05/28/2004, when Plaintiff's mother threatened to shoot him "between the eyes." Any person of average intelligence would have realized there was a possibility of injury. Plaintiff's action was brought 39 days later, within the "two year" period. Can The Court of Appeals of Georgia simply ignore the plain language of the law of the state?

A psychiatric disorder, a diagnosable mental illness, is separate and distinct from a mere physical injury. The psychiatric damage in the instant case is the "loss."

Cite: "Although Lam suffered no physical injuries as a result of the collision, Lam testified on her deposition

that the collision aggravated a preexisting mental illness. ...A mental injury, or the aggravation of a preexisting mental illness, is clearly an injury to the person." NATIONWIDE MUTUAL FIRE INS. CO. v. LAM et al, A00A2405 (248 Ga. App. 134) (546 SE2d 283) (2001).

Cite: "If there should be any limitation on the logic of this rule it should, we think, be legislative and not judicial. It is not for us to say, for example, that a plaintiff has no cause of action for a lung cancer allegedly caused by 'Agent Orange' merely because he had suffered and causally discovered an unrelated red rash on his palms and feet, or headaches, caused by 'Agent Orange,' two years and one day before." ANDERSON v. SYBRON CORP. (165 Ga. App. 566, 568) (299 SE2d 160) (1983).

Per Anderson the "red rash on his palms and feet" was the physical injury; the Post Traumatic Stress Disorder (309.81) is the "lung cancer." Stated in Oral Argument (MT P. 22, L. 20; 10-18-06): "I was aware that I had been physically injured to some degree by the actions of the Defendants. I was not however aware until 2004 that I had sustained a life-long psychological injury due to the actions of the Defendants. I was aware that I had received a 'red rash' on my hands and feet from the Defendant's 'Agent Orange.' I was not however aware I had received the 'lung cancer.'"

Plaintiff would not dare bring an action for the physical injuries *known* at the time of the original commission, he only brings an action for the *unknown* diagnosable PTSD (309.81). If no mental disorder consequent to the Defendants' actions was ever diagnosed, no court of law would have ever heard of this case.

Plaintiff's claims against Defendants for inflicting the injuries known as Post Traumatic Stress Disorder 309.81 are valid under the plain language of Official Code of Georgia Annotated 50-21-27; as well as the precedent set in Mobley, King and Anderson supra. The use of any other

theory of law deprives the Plaintiff of the Due Process and Equal Protection clauses of the 14th Amendment. Due Process because he could never over the course of his life have obtained a remedy for the right that Defendants violated. Equal Protection because he, as a class of persons mentally injured, has been set aside and treated differently from those who sustained diagnosable physical injuries.

Georgia Standard of Review: "'[P]lain legal error...'" SUAREZ et al. v. HALBERT et al., A00A1240, 246 Ga. App. 822, (543 SE2d 733) (2000).

Cite: "Pro se pleadings are held to less stringent standards than pleadings that are drafted by lawyers. Evans v. City of Atlanta, 189 Ga. App. 566, 567 (377 SE2d 31) (1988); see Haines v. Kerner, 404 U. S. 519 (92 SC 594, 30 LE2d 652) (1972), Dillingham v. Doctors Clinic, 236 Ga. 302 (223 SE2d 625) (1976)." THOMPSON v. LONG (201 Ga. App. 480) (1) (411 SE2d 322) (1991).

F. Other Relief

Plaintiff/Petitioner also prays for such other and further relief as may be due and granted under the rules of this court and the laws of the United States.

REASONS FOR GRANTING THE PETITION

Rule of law.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2007, February 2008

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: September 10, 2007

Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

Case No. S07C1385

DWAIN LEE KIRKLAND v. RUBY KIRKLAND et al.

COURT OF APPEALS CASE NO. A07A0863 S07C1399 S07C1519

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

THIRD DIVISION
BLACKBURN, P. J.,
RUFFIN and BERNES, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5,2002) http://www.gaappeals.us/rules/

April 17, 2007

In the Court of Appeals of Georgia

A07A0863. KIRKLAND v. KIRKLAND et al. BL-043

BLACKBURN, Presiding Judge.

Dwain Lee Kirkland, pro se, appeals the denial of his motion for summary judgment and the grant of summary judgment to his mother, Ruby Kirkland, whom Dwain sued individually and in her capacity as executor of his father's estate, alleging various tortious conduct. Dwain contends that the trial court erred by (1) denying two recusal motions, (2) relying on Ruby's affidavit filed in response to Dwain's motion for summary judgment, (3) ruling that his personal injury claims were time barred, (4) ruling that his claim based on post traumatic stress disorder (PTSD) was not a continuing tort, (5) and granting summary judgment on his breach of contract claim. For the reasons that follow, we affirm.

Summary judgment is proper when there is no genuine issue of
material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 (c). A de novo

> standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.

Matjoulis v. Integon Gen. Ins. Corp.[1]

So viewed, the record shows that in July 2004, Dwain, then a forty-nine-year-old, filed a complaint against his mother and his deceased father's estate, alleging various tortious acts committed during his childhood which amounted to intentional and negligent infliction of emotional distress, assault, battery, and breach of contract. Dwain also alleged that he now suffers from PTSD due to the physical and verbal abuse he received as a child, and that Ruby threatened to kill him in 2004, just prior to his filing of the lawsuit. After deposing Dwain, Ruby moved for summary judgment, arguing that Dwain's claims were time-barred by the two-year statute of limitations in OCGA § 9-3-33. Dwain then moved for summary judgment, and Ruby responded with an affidavit denying Dwain' s factual allegations. After a hearing, the

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[1] *Matjoulis v. Integon Gen. Ins. Corp.*, 226 Ga. App. 459 (1) (486 SE2d 684) (1997).

trial court granted Ruby's motion and denied Dwain's motion, giving rise to this appeal.

1. During the discovery process, Dwain moved to recuse Judge Hodges, who was assigned this case and who had apparently earlier heard a separate case in which Dwain appealed a probate court ruling on Dwain's caveat

to his father's will. Judge Bailey held a hearing on Dwain's motion and subsequently denied Dwain's motion to recuse Judge Hodges. Dwain then filed a motion to recuse Judge Bailey, who denied that motion as untimely. Dwain now appeals the denial of both motions to recuse.

(a) *Recusal of Judge Hodges.*

> This Court employs an abuse of discretion standard in reviewing rulings made upon motions to recuse. In order to disqualify a judge, the alleged bias must stem from an extra-judicial source and result in an opinion based on something other than what the judge learned from participating in the case. The trial judge has the duty to determine whether, assuming the truth of the facts alleged, a reasonable person might conclude that the judge harbors bias, stemming from an extrajudicial source, which is of a nature and intensity as would interfere with the exercise of impartial judgment.
>
> (3)

(Citation and punctuation omitted.) *Kirkland v. Tamplin.*[2]

Here, Dwain based his motion to recuse on an affidavit alleging that Judge Hodges (1) displayed a "tone of voice and facial expression" showing animosity, and (2) that Judge Hodges said, "Mr. Kirkland has filed a caveat which I assume was decided against him in the probate court and he has now filed an appeal to this court." With respect to Judge Hodges's "tone and demeanor," Dwain's conclusory characterization does not demonstrate an extra-judicial bias of a nature and intensity that would interfere with an impartial exercise of judgment. See *Kirkland v. Tamplin,* supra, _ Ga. App. _, slip op. at 11-12 (3) (a). With respect to Judge Hodges's statement, which was accurate

and respectfully worded, we discern no evidence of bias. Accordingly, this enumeration is without merit.

(b) *Recusal of Judge Bailey.* Following Judge Bailey's ruling on the motion to recuse Judge Hodges, Dwain moved to recuse Judge Bailey, citing the fact that Judge Bailey had in a prior unrelated hearing appeared "friendly" and in the recusal hearing Judge Bailey appeared "flat" and did not ask any questions. Dwain also alleged that Judge Bailey off the record chatted briefly with opposing counsel in a friendly

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[2] *Kirkland v. Tamplin,*_ Ga. App. _, slip op. at 9-10 (3) (A07A0663; decided February 1, 2007).

manner without chatting with Dwain. These assertions are identical to arguments we found meritless in an earlier appeal brought by Dwain in a similar case. See *Kirkland v. Tamplin,* supra, _ Ga. App. _, slip op. at 13 (3) (b). We therefore discern no error here.

2. Dwain contends that an affidavit Ruby filed in response to Dwain's motion for summary judgment was untimely. We disagree.

OCGA § 9-11-56 (c) provides that a party adverse to a motion for summary judgment may serve an opposing affidavit "prior to the day of hearing." Here, the trial court sent both parties a rule nisi notice one month before the hearing, which was held on October 18,2006. On October 17,2006, Ruby filed an affidavit disputing the facts alleged by Dwain, and served the affidavit by U.S. mail the same day, i.e. one day prior to the hearing. As service by mail is complete upon mailing, OCGA § 9-11-5 (b), the affidavit was not untimely. See *Martin v. Newman,*[3] *Owen*

v. M & M Metro Supply, Inc.[4] ("service is perfected where there is proof of service in one of the ways

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[3] Martin v. Newman, 162 Ga. App. 725, 726 (2) (293 SE2d 18) (1982).

[4] Owen v. M & M Metro Supply, Inc., 198 Ga. App. 420, 421 (1) (401 SE2d 612) (1991).

specified in the statute, even though the adverse party may not have in fact received actual notice").

3. Dwain contends that the trial court erred in ruling that his claims were barred by the statute of limitations. We disagree.

As demonstrated by Dwain' s complaint, deposition, and subsequent affidavits, Dwain alleges that Ruby and his father committed various personal injuries to Dwain when Dwain was a child, and he now seeks damages for those abuses.[5] Ruby moved for summary judgment on the ground that Dwain' s claims were time barred by OCGA § 9-3-33, which provides that "(a)ctions for injuries to the person shall be brought
within two years after the right of action accrues." As the alleged abuses were themselves wrongful, Dwain' s right of action accrued at the time of the abuse, which Dwain's deposition shows ended at the latest, by the time he moved out of state in 1977, when Dwain was 22. See *Risner v. R. L. Daniell & Assoc. P. C.*[6] Hence, the trial court did not err in granting summary judgment to Ruby.

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[5] Dwain's complaint contains many wide-ranging and

vague allegations. However, in an affidavit filed July 10,2006, he concedes that many of the alleged wrongful acts did not cause monetary damages.

[6] *Risner v. R. L. Daniell & Assoc. P.C.*, 231 Ga. App. 750, 752 (500 SE2d 634) (1998).

4. Dwain also contends that the trial court erred in refusing to apply the theory of continuing tort to his allegation of PTSD. We disagree.

Dwain alleges that due to physical and mental abuse he received as a child, he now suffers from PTSD as an adult. In response to Ruby's statute of limitations defense, Dwain alleges that he did not discover his disorder until 2004, the year he filed this suit. However, "[t]he fact that appellant may not have recognized, or discovered, the full impact of the alleged harm until [2004] does not obviate the fact that [his] exposure to the tortious acts producing the injur[ies]," ceased more than two years before he filed his complaint.[7] *Hickey v. Askren.* [8] See *Bitterman v. Emory University* [9] (plaintiff s "injury was occasioned by violent external means and the statute of limitation began to run on the day his injury was actually sustained") (punctuation omitted). Therefore, this enumeration is without merit.

5. Dwain also contends that the trial court erred in granting summary judgment to Ruby on a breach of contract claim. However, in his deposition and a subsequent

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[7] Because Dwain was no longer a minor as of 1973, this outcome is not affected by OCGA § 9-3-90, which tolls

the statute of limitations during which time a person is a minor.

[8] *Hickey v. Askren,* 198 Ga. App. 718, 720 (2) (403 SE2d 225) (1991).

[9] *Bitterman v. Emory University,* 175 Ga. App. 348 (1) (333 SE2d 378) (1985).

(7)

affidavit, Dwain conceded, in his own words, that (1) "there is no real legal aspect to" his breach of contract claim, (2) "there is no claim there," and (3) that he did not find that claim to "have caused the monetary damages" alleged in the complaint. In Dwain's brief, he asserts that he was remembering the claim incorrectly during his deposition, and that he supplemented his deposition with an affidavit. However, that
affidavit alleged that his father had an extramarital affair and contains nothing relating to a breach of contract. Accordingly, we discern no error.

6. We exercise our discretion to deny defendants' motion for sanctions. Dwain's remain enumerations are moot.

Judgment affirmed. Ruffin and Bernes, JJ., concur.

(8)

IN THE SUPERIOR COURT OF MADISON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
2006 Oct 23 02:07 PM
MICHELE H. STRICKLAND
CLERK OF COURT
MADISON, GEORGIA
2006-8515
(stamped)

DWAIN LEE KIRKLAND)
Plaintiff,

v.) CIVIL ACTION FILE
NO.04-MV-584-H

RUBY KIRKLAND, EXECUTOR OF
THE ESTATE OF A. LEON
KIRKLAND, and RUBY KIRKLAND,

Defendants.)

ORDER

The Plaintiff's Motion for Summary Judgment and the Defendants' Motion for Summary Judgment having come before this Court, and the Court having reviewed the parties' briefs and all admissible matters of record in this action, and having heard oral argument from counsel for Defendants and from Plaintiff, pro se;

This Court finds that there exists no genuine issue as to any material fact in this case, and

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is denied;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is granted.

SO ORDERED this 23rd day of October, 2006.

(signed)

The Honorable Thomas L. Hodges
Judge, Superior Court
Madison County, Georgia